IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 33

MURRAY WINTERS,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPELLANT'S BRIEF

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No. 636

MURRAY WINTERS,

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APPELLANT'S BRIEF

Opinions Below

The opinion of the Appellate Division of the Supreme Court of the State of New York is reported at 268 App. Div. 30. The opinion of the Court of Appeals of the State of New York is reported at 294 N. Y. 545.

Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code (28 U. S. C. A. 861 (a) and 861 (b)).

Statute Involved

Appellant was convicted of violating subdivision 2 of Section 1141 of the Penal Law of the State of New York (R. 1, 23).[1] That statute reads:

"A person * * * who * * *

2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; * * *

Is guilty of a misdemeanor * * *."

Features of the Statute

(a)

There is no issue of obscenity in this case. Appellee has conceded this in all the State Courts.

The charge and conviction against appellant are not under subdivision 1 of Section 1141 which bars "obscene, lewd, lascivious, filthy, indecent or disgusting" publications; but under subdivision 2 which is directed against publications devoted to "criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of bloodshed, lust or crime."

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1 Appellant contested the constitutionality of the statute in all the State Courts, and those Courts necessarily passed on that question (R. 23, 31, 39, 40-41, 43).

(b)

The classifications proscribed by subdivision 2 are in the disjunctive, so that a publication devoted to any one of the subjects named comes within the statute.

(c)

The statute makes no distinction between truth, fiction, and statistics. All come within its condemnation equally, provided they consist of "criminal news" or "police reports" or "accounts of criminal deeds" etc.

(d)

The statute itself is general and all-inclusive with respect to the classifications of writings it bans, and with respect to its application. No limitations are stated therein; no standard or definition given; no attempt made at discrimination or regulation.

History of the Statute

(a)

Prior to 1884 there was no law in New York State barring publications like those here involved. There was a statute barring "obscene or indecent" writings—Section 317 of the Penal Code of the State of New York.[2]

In 1884, the Legislature of the State of New York amended Section 317[3] by adding thereto three paragraphs, of which the last two have no bearing herein. The entire

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2 The predecessor of subdivision 1 of Section 1141 of the Penal Law.

3 By Chapter 380 of the Laws of 1884.

previous section became Subdivision 1 of the amended section—the Legislature's marginal note describing the purpose thereof read, "Selling, giving away, etc., obscene books, etc., a misdemeanor."

Subdivision 2, newly added, read:

> "2. Sells, lends, gives away, or shows, or has in his possession with intent to sell or give away, or to show, or advertises or otherwise offers for loan, gift, sale or distribution, *to any minor child*, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, or principally made up of criminal news, police reports or accounts of criminal deeds or pictures and stories of deeds of bloodshed, lust or crime; * * *" (Emphasis mine.)

The Legislature's marginal note describing the purpose of this new law read, "Ibid. to minor child, of papers, etc., devoted to police reports, etc."

In 1887 the Legislature amended Section 317 again.[4] Subdivision 1 was amplified so that the reference to "obscene or indecent" writings became one to "obscene, lewd, lascivious, filthy, indecent or disgusting" writings.[5] Subdivision 2 was amended to read substantially as subdivision 2 of Section 1141 reads.[6] The words "to any minor child" were eliminated, and a few additional acts, such as, "Prints, utters, publishes," were added. In fact, with the exception of the word, "distributes," which was added in

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4 By Chapter 692 of the Laws of 1887.

5 Subdivision 1 of Section 317 of the Penal Code subsequently became subdivision 1 of Section 1141 of the Penal Law.

6 Subdivision 2 of Section 317 of the Penal Code subsequently became subdivision 2 of Section 1141 of the Penal Law, the statute involved in this case.

a later year, subdivision 2 of Section 317 of the Penal Code as amended by the Laws of 1887 was identical with subdivision 2 of Section 1141 of the Penal Law,* the statute involved herein.

In Chapter 692 of the Laws of 1887, the Legislature's marginal note to subdivision 1 referred to "obscene publications," and the marginal note to subdivision 2 referred to "police and immoral publications."

The foregoing shows that the statute in its present form was not intended to be restricted in its application to any particular class or type of persons.

(b)

Although subdivision 2 was enacted over sixty years ago, the instant case is the only reported time it was ever applied. It seems that except for the case at bar, it has been a "dead letter law" from the day of its adoption, and that there has been no reported prosecution under, or application of it. In connection with this should be borne in mind the fact that magazines and books of this kind have been published and sold freely and openly during that period, and still are.

Statement of the Case

(a) Proceedings in the Court of Special Sessions of the City of New York.

On December 2, 1942, the District Attorney of New York County, on the complaint of an agent of the New York Society for the Suppression of Vice, filed an information against appellant in the Court of Special Sessions of the

* The Penal Law is the successor to the Penal Code.

City of New York. The information contained five counts, of which the first three charged appellant with violating subdivision 1 of Section 1141 of the New York Penal Law, and the last two charged appellant with violating subdivision 2 of Section 1141 (R. 2-5, 23).

The charges were that appellant, the owner of a retail book store, in August, 1942 possessed with intent to sell, and offered for sale certain magazines, which the information alleged violated the above laws.

After a trial in the Court of Special Sessions, appellant was acquitted on the first three counts, those charging a violation of subdivision 1 (the "obscenity" statute); and was convicted on the last two counts, those charging a violation of subdivision 2 (R. 5, 23).

(b) Appeal to, and decision of the Appellate Division.

Appellant appealed to the Appellate Division of the Supreme Court of the State of New York from the judgment of conviction (R. 1-2). That court affirmed the conviction, holding the statute within the police power of the state on the ground that it was aimed at restraining publications which "tend to demoralize the minds of their more impressionable readers,"[8] and so was "designed to promote the

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8 This test adopted by the Appellate Division came from the long abandoned doctrine of *Regina* v. *Hicklin*, L. R. 3 Q. B. 360, viz., "the tendency to deprave and corrupt those whose minds were open to immoral influence."

In rejecting this doctrine, Judge Learned Hand, in *United States* v. *Levine*, 83 Fed. 2d, 156, 157, held:

> "No civilized community not fanatically puritanical would tolerate such an imposition, and we do not believe that the courts that have declared it, would ever have applied it consistently."

general welfare and to protect the morals of the community". (R. 38).

(c) Appeal to, and decision of the Court of Appeals.

Appellant, by leave of the justice of the Appellate Division who wrote the opinion for that court, appealed to the Court of Appeals of the State of New York (R. 35, 36). That Court affirmed the conviction (Chief Judge Lehman dissenting) on the ground that "Indecency or obscenity is an offense against the public order" and that subdivision 2 is directed against a form of indecency different from that referred to in subdivision 1 (R. 46).

Such a test would bar all books on the subject, however treated. The Court of Appeals of the State of New York, in *People* v. *Muller*, 96 N. Y. 408, 411, overruled a like test suggested for subdivision 1 of Section 1141:

> "If the test of obscenity or indecency in a picture or statue is its capability of suggesting impure thoughts, then indeed all such representations might be considered as indecent or obscene. The presence of a woman of the purest character and of the most modest behavior and bearing may suggest to a prurient imagination images of lust, and excite impure desires, and so may a picture or statue not in fact indecent or obscene."

In *People* v. *Pesky*, 230 App. Div. 200, 204, aff'd. 254 N. Y. 373, it was held that the standard of judgment is the normal person, not the abnormal:

> "Conditions would be deplorable if abnormal people were permitted to regulate those matters."

Furthermore, the Appellate Division's holding that the statute is constitutional because it is aimed at publications that "*tend*" to effect a certain result is in direct conflict with the ruling of this court in *Bridges* v. *California*, 314 U. S. 252, 263, 273, which held that "neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression."

See also: *Whitney* v. *California*, 274 U. S. 357, 376-377.

After stating:

> "Collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense, though not necessarily in the sense of being calculated or intended to excite sexual passion. This idea, as it seems to us, was the principal reason for the enactment of the statute."

the furthest the Court went with respect to the magazines involved in this case, was:

> "The contents are nothing but stories and pictures of criminal deeds of bloodshed and lust. The Appellate Division said: 'The stories are embellished with pictures of fiendish and gruesome crimes, and besprinkled with lurid photographs of victims and perpetrators. Featured articles bear such titles as "Bargains in Bodies," "Girl Slaves to a Love Cult" and "Girls Reformatory."' It is not suggested that any of the contributors was distinguished by his place in the literary world or by the quality of his style. (Cf. *Halsey* v. *New York Society*, 234 N. Y. 1.) In short, we have here before us accumulations of details of heinous wrongdoing which plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake" (R. 46).

The Court of Appeals tacitly admitted appellant's contention that "the criterion of criminal liability thereunder [under the statute] is 'a personal taste standard, uncertain, indefinite and *ex post facto* in its practical operation'"; answered it by stating:

> "In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order."[9]

and brushed aside as of no importance the fact that under such a rule the "publication of any crime book or magazine would be hazardous" (R. 47).

And this, with reference to a penal statute suppressing the freedom of the press!

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9 The assumption by the Court that certain "types of books are likely to bring about the corruption of public morals or other analogous injury to the public order" is an over-simplification of a very complex subject, and runs counter to the findings of eminent authorities on criminology and crime prevention. Prof. Sheldon Glueck in *Preventing Crime* (McGraw-Hill, 1936) and Prof. Donald R. Taft in *Criminology* (Macmillan Co., 1942) show that no one factor can be said to cause crime, since the causes of crime are multiple. In no part of Prof. Glueck's book *Preventing Crime*, the most comprehensive book of its kind in recent years, has the kind of literature here in issue been designated as a cause of crime.

There is no way of anticipating the effect of any book on crimes, no matter how the subject may be treated, upon a "more impressionable" reader. A person who is predisposed to anti-social behavior because of the existence of other conditions which are pre-disposing factors might be motivated to imitate a crime described in *any* literature (even in Dickens or Shakespeare); but, any experience might be a precipitating factor for such a person. A person not so pre-disposed (and the criterion in applying the statute is such a person—*People* v. *Muller*, 96 N. Y. 408; *People* v. *Pesky*, 230 App. Div. 200, 204, aff'd. 254 N. Y. 373; *United States* v. *Levine*, 83 Fed. 2d, 156, 157) would not be led to imitate (*Criminology* by Prof. Donald R. Taft; *Art & Prudence* by Prof. Mortimer Adler).

In the field of morality there is the maxim: "According as a man is, so does the end seem to him." (Nichomachean, *Ethics*, Bk. III, 7, 1114-a, 32), and the metaphysical maxim: "That which is received is in the recipient according to the mode of the recipient."

It should be remembered that the original limitation in subdivision 2, "to any minor child," was removed in 1887, so that the present statute is unlimited in its application.

Lehman, *Ch. J.*, dissented as follows:

"I dissent on the ground that the statute, as construed by the court, is so vague and indefinite as to permit punishment of the fair use of freedom of speech. (Stromberg v. California, 283 U. S. 359.) Though statutes directed against 'obscenity' and 'indecency' are not too vague when limited by judicial definition, they may be too vague when not so limited. (See McJunkins v. State, 10 Ind. 140; Jennings v. State, 16 Ind. 335.). It is the function of the Legislature to define the kind of conduct which is harmful from the standpoint of public order or morality and should be prohibited. Then the question whether the conduct of a defendant falls within that definition may be one of fact. The morality of the community does not, however, become the standard of permissible conduct until the Legislature has embodied its conception of that morality in a regulatory statute" (R. 48-49).

The Magazines

The magazines, for whose possession and offer to sell appellant was convicted, are entitled, "Headquarters Detective, True Cases from the Police Blotter, June 1940," and "Headquarters Detective, True Cases from the Police Blotter, August 1940." As the Appellate Division stated, they "purported to contain true cases of crimes from police records and files" (R. 37), and in all the State courts they were so considered.

To describe even briefly the stories and pictures in the magazines would take too much and unnecessary time and space, unnecessary because the stories must be read in their entirety, and the pictures viewed in connection with such a reading, in order to assay them properly. It suffices to say that, except for a couple of stories in the nature of

"true confessions," they are the stories of actual crimes and prosecutions, written in large part in a reportorial fashion, giving dates, places, and names of persons involved; that many of them are told by County and State officials; that with a few exceptions (which are themselves innocuous) the pictures on their face show that they are actual photographs of the events; and that the recurrent theme of the stories is that *"Crime Does Not Pay."* Far from inciting to crime, they show that *"The Wages of Sin Is Death."*

The magazines themselves are of no great importance. The importance of this case stems, not from the merits or lack of merits of the magazines, but from the right infringed, and from what the effect of the statute could be, and what it could lead to. It is a wedge that should be destroyed, lest other restrictions be imposed in the name of the same alleged interest "to protect the morals of the community" (R. 38). "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion" (*Thomas* v. *Collins*, 323 U. S. 516, 545).

Specifications of Assigned Errors

The Court of Appeals of the State of New York erred:

1. In holding that Section 1141 sub. 2 Penal Law of the State of New York does not deprive appellant of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

2. In refusing to hold that the said statute violates appellant's rights of freedom of speech and press un-

der the Fourteenth Amendment of the Constitution of the United States.

3. In refusing to hold that the said statute as applied to appellant denies him his rights of freedom of speech and press under the Fourteenth Amendment of the Constitution of the United States.

4. In refusing to hold that the said statute is so indefinite and uncertain as to deny appellant his liberty without due process of law under the Fourteenth Amendment of the Constitution of the United States.

5. In refusing to hold that the magazines possessed by the appellant were not a clear and imminent danger to the welfare of persons in the City of New York where they were possessed.

6. In refusing to hold that the publication possessed by appellant was not a clear and imminent danger to readers of them (R. 51-52).

Outline of Argument

Appellant contends that the judgment of conviction cannot stand because it, and the statute under which it was rendered violate the constitutional guaranty of freedom of the press.

POINT I

The judgment of conviction against appellant should be reversed because it, and the statute under which it was rendered violate the constitutional guaranty of freedom of the press.

(a) The statute restricts freedom of the press. Therefore, if it is unconstitutional, the conviction must be reversed.

Freedom of the press, guaranteed by the First Amendment to the Constitution, has been protected by the Fourteenth Amendment from impairment by the states.

Douglas v. *Jeanette*, 319 U. S. 157, 162.

This Court has held that freedom of the press is in a "preferred position" (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 115), "to be guarded with a jealous eye" (*American Federation of Labor* v. *Swing*, 312 U. S. 321, 325); that in passing upon legislation seeking to repress or control the press, it should be borne in mind that the constitutional provision is "a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow" (*Bridges* v. *California*, 314 U. S. 252, 263); and that

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions" (*Schneider* v. *State*, 308 U. S. 147, 161).

Because of the nature of this right, it was held in *Thornhill* v. *Alabama*, 310 U. S. 88, at page 97:

> "Proof of abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas."

and at page 98:

> "Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression."

A corollary principle is that:

> "The constitutional validity of law is to be tested, not by what has been done under it, but by what may by its authority be done."
>
> *People ex rel. Alpha P. C. Co.* v. *Knapp*, 230 N. Y. 48, 54.

This is because a criminal law cannot be constitutional in some cases, and unconstitutional in others falling within the same class. If it is unconstitutional as to any, it is unconstitutional as to all. (*Murphy* v. *Commonwealth*, 172 Mass. 264, 273); if what is constitutionally protected falls within the statute, the statute is unconstitutional, even though it also covers cases in which it could act constitutionally (*Wynehamer* v. *People*, 13 N. Y. 378, 424-425, 440-442).

(b) If any part of the statute is unconstitutional, the conviction must be reversed.

Since subdivision 2 is in the disjunctive, this raises the question of its validity not merely as a whole, but of each one of the various classes of publications made a crime.

Stromberg v. *California*, 283 U. S. 359, 364-365.

The judgment of conviction against appellant was a general one (R. 30, 5). It did not specify the classification within the statute upon which it rested. As there are several distinct classifications set forth in the statute, and the trial court might have convicted with respect to any one of them, independently considered, it is impossible to say under which one the conviction was obtained. If any one of the classifications is unconstitutional, the conviction cannot be upheld. Any other procedure would be sheer denial of due process.

Stromberg v. *California*, 283 U. S. 359, 367-368;
Williams v. *North Carolina*, 317 U. S. 287.

(c) The degree of repression imposed by the statute is unconstitutional.

Assuming *arguendo* that it might have been competent for the legislature to have passed an act to protect certain specified classes of persons, or to operate upon certain specified types or degrees of crime literature under certain named circumstances (this we dispute, see page 20, *infra*), this is not such an act. It would permit punishment for the publication of "criminal news" alone, or "police reports" alone, as well as "accounts of criminal deeds," or any of the other prohibited subjects; and that, whether

consisting of truth or statistics, as well as fiction. The statute itself is general and all-inclusive, and makes no attempt at distinction or regulation. Its character is such that it strikes at the very foundation of freedom of the press.

Furthermore, the statute, both as written and as applied in the case at bar, has been made for, and is applicable to everybody in the State, as if everyone needed the same protection. It has not been claimed that so broad a restriction is necessary. Its practical application, illustrated by the case at bar, the only time it was applied, renders it unconstitutionally repressive. We may well say of it:

> "The fact that some regulation may be permissible, however, does not mean that the First Amendment may be abrogated. We are not dealing here with a statute, 'narrowly drawn to cover the precise situation' that calls for remedial action (cits.) * * * Prohibition may be more convenient to the law maker, and easier to fashion than a regulatory measure * * * But that does not justify a repressive enactment like the one now before us."

Martin v. *Struthers*, 319 U. S. 141, 151.

This is particularly so because freedom of the press is a right not lightly to be taken away.

(d) The construction given the statute by the Court of Appeals renders it vague and indefinite.

Nor does the construction given the statute by the Court of Appeals alter the situation. As Chief Judge Lehman stated in his dissent, "the statute, as construed by the court, is so vague and indefinite as to permit punishment of the

fair use of freedom of speech" (R. 48). The majority opinion acknowledges that the test formulated by it is indefinite (R. 47), and that under it, the exercise by a person of his constitutional right of freedom of the press would entail risk (R. 47-48). Risks the law sanctions in the exercise of lesser rights should not be suffered where a right that has been termed "the matrix, the indispensable condition, of nearly every other form of freedom," [10] one of "the most cherished policies of our civilization," [11] "essential to the very existence and perpetuity of free government" [12] is involved. The Court of Appeals erred in applying to such a right the rule relating to the exercise of police power over ordinary rights.

The Court of Appeal's construction "blankets with uncertainty whatever may be said." A "sharp line cannot be drawn surely or securely. The effort to observe it could not be free speech, free press" (*Thomas* v. *Collins*, 323 U. S. 516, 535).

The result of the Court of Appeal's construction of the statute would be to leave a publisher or retail storekeeper in doubt as to whether any particular book or magazine would be held within the statute: it would be sheer guesswork on his part, without a foreseeable standard for judgment, or predicability. The test offered is vague, uncertain, indefinite. Different juries or different judges might, under that construction, render different rulings with respect to the same book. Because, under the Court of Appeal's decision, each such finding would be one of fact, and the test is so vague, the Appellate Courts would be bound

10 *Palko* v. *Connecticut*, 302 U. S. 319, 327.

11 *Bridges* v. *California*, 314 U. S. 252, 260.

12 *Ex parte McCormick*, 129 Texas Crim. Rpts., 457, 461.

thereby. The result would be chaos. It would permit excesses in local applications of the statute; the fines might be small, precluding as a practical matter appeals to a higher Court. A sword of Damocles would hang over each publisher who sought to exercise his right of freedom of the press. So fundamental a right should not rest on so tenuous a thread.

This Court held a penal statute unconstitutional on the foregoing grounds in *Connally* v. *General Const. Co.*, 269 U. S. 385, wherein it was held, at page 391:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The Court, at pages 392-393, quoted with approval from the case of *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, 596, 598:

> "'The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be

so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another * * * There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.

* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.'"

The final conclusion of the Court in that case, at page 395, is applicable to the instant case:

"The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty

of due process cannot be allowed to rest upon a support so equivocal."

(c) The type of repression is unconstitutional.

We recognize that the right of free speech and a free press is not absolute; that there are certain fields over which the Legislature may exercise proper control. But, the power to restrict is the exception rather than the rule;[13] and the fields within which the legislature may exercise control, and then only to a properly limited and specifically formulated extent,[14] are well-defined and narrowly limited. They are enumerated in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to invite an immediate breach of the peace."

The matter barred by subdivision 2 concededly does not come within any of the classes above enumerated. The word "lust" in subdivision 2 was not intended to be akin to "lewd and obscene." The rule of *ejusdem generis* shows this; the appellee has conceded it in all the State courts;

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13 *Herndon* v. *Lowry*, 301 U. S. 242, 258.

14 *Martin* v. *Struthers*, 319 U. S. 141, 151.

and the Court of Appeals so stated in its opinion. Those classes should not be enlarged to include the subject-matter of subdivision 2. This is all the more so because of the invalidity, or at the very least, the extreme doubt as to the merits of the reasoning regarding the purpose and effect of subdivision 2.[15] In *Schneider* v. *State*, 308 U. S. 147, 161, this Court held:

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."[16]

(f) The statute violates the "clear and present danger" principle.

The statute here involved is a direct repression of freedom of the press. The test of the constitutionality of such a statute is not whether there is a "rational connection between the remedy provided and the evil to be curbed," but whether it was enacted "to prevent grave and immediate danger." (*Thomas* v. *Collins*, 323 U. S. 516, 530; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639). In applying this test, this Court has established "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high" (*Bridges* v. *California*, 314 U. S. 252, 263). "Neither

15 See note 9, page 9, *supra*.

16 The wisdom of such a principle is well illustrated by contrasting the reasoning of the State Courts (*supra*, pp. 6-7, 7-9) with the findings of Profs. Glueck, Taft and Adler (note 9, page 9, *supra*).

'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression" (Id. at p. 273).

Because "the power of a state to abridge freedom of speech and of assembly is the exception rather than the rule" (*Herndon* v. *Lowry*, 301 U. S. 242, 258), and because "any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger" (*Thomas* v. *Collins*, 323 U. S. 516, 530), it seems to follow that the burden is on the State to show why the exception should be invoked in any given case (*Thornhill* v. *Alabama*, 310 U. S. 88, 96).

Not only is the record completely barren of any proof thereon by the State; but the very history of the statute, the fact that, except for the case at bar, it has been a "dead letter law," although similar magazines have openly and freely been sold, and still are, demonstrates conclusively that there is not, and never has been any "grave and immediate danger," [17] let alone a "substantive evil—extremely serious and the degree of imminence extremely high." [18] Nor does concern for the public good justify curtailment of free expression (*Thomas* v. *Collins*, 323 U. S. 516, 545).

In considering the effect of reading crime stories, sequential acts should not be confused with consequential results. The reading of such literature does not cause the commission of crimes.[19]

The long delay in attempting to enforce the statute (during which time there were countless prosecutions throughout the state under subdivision 1), and that there has been almost an entire absence of similar statutes, "is significant

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17 *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639.

18 *Bridges* v. *California*, 314 U. S. 252, 263.

19 See note 9, page 9, *supra*.

of the deep-seated conviction that such restraints would violate constitutional right."

Near v. *Minnesota*, 283 U. S. 697, 718.

CONCLUSION

The judgment of conviction should be reversed, and the information against appellant dismissed.

Respectfully submitted,

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March 8, 1946.